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**DEPARTMENT OF STATE REVENUE
LETTERS OF FINDINGS NUMBERS:
00-0349; 00-0350; 00-0351; 00-0352
State Gross Retail Tax
For Tax Periods 1994-1996**

NOTICE: Under Ind. Code § 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUE

I. State Gross Retail Tax—Exemption Certificates; Non-exempt Items

<u>Authority:</u>	IC § 6-8.1-1-1	45 IAC 2.2-5-1(b)
	IC § 6-8.1-3-4	45 IAC 2.2-5-3
	IC § 6-2.5-2-1(a)	45 IAC 2.2-5-4
	IC § 6-2.5-8-8	45 IAC 2.2-8-12
		45 IAC 2.2-8-13
		45 IAC 15-3-3(a)

Taxpayer protests proposed assessments of Indiana's gross retail tax which were based on the Department's determination that taxpayer used improper exemption certificate forms. The Department also determined that even if taxpayer's forms were acceptable, certain retail sales did not qualify as exempt transactions.

STATEMENT OF FACTS

Taxpayer operates a chain of small retail stores located throughout the Midwest, with four locations in Indiana. Taxpayer sells farm and home merchandise, treating all sales as taxable unless the customer states the transaction is exempt. If the customer so states, the particular item is sold exempt from Indiana's gross retail tax. The customer is then required to sign a receipt and provide his exemption number. The Department audited taxpayer for tax years 1994-1996, finding that taxpayer's clerical staff was not following taxpayer's record keeping system for exempt transactions. Additionally, the audit determined that many items purchased exempt from the gross retail tax did not qualify for the statutory and regulatory exemptions. In advance of the hearing, taxpayer obtained proper exemption certificates from customers making the purchases at issue in the audit. These forms were sent to the Hearing Officer for review.

I. Gross Retail Tax—Exemption Certificates; Exempt vs. Non-Exempt Items

DISCUSSION

Taxpayer protests proposed assessments of Indiana's gross retail tax which were based on the Department's determination that taxpayer used improper exemption certificate forms. Taxpayer did not use forms the Department expressly provides for the purpose of recording and tracking the state's gross retail tax. The agricultural exemption certificate (Form ST – 104) must be completed by purchasers of tangible personal property that "will be directly used in the direct production of agricultural products for resale." The transactions at issue in the audit were sales of fencing materials. Taxpayer's "exemption certificates" were on the back of every sales invoice; they asked for the purchaser's name and social security number. The purchaser then signed the back of the invoice "under penalty of perjury."

Form ST – 104 requires more information: the type of article purchased, the purchase price, a description of how the item is to be used, the date, purchaser's name, address, and signature, plus the purchaser's social security number or FID number. The purchaser certifies "under penalties of perjury" that the property purchased "by the use of this exemption certificate will be directly used in the direct production of agricultural products for resale." Obviously, State Form ST – 104 requires that more information be provided to the seller before the seller is relieved of his statutory duty to collect and remit Indiana's gross retail tax. Further, the form sets forth the specific strictures providing the exemption in the first instance: direct use in the direct production of agricultural products the purchaser sells.

As a preliminary matter, it should be noted that under IC § 6-8.1-5-1(b), a "notice of proposed assessment is *prima facie* evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." The substantive statutory requirements are relatively straightforward. IC § 6-2.5-2-1(a) imposes "the state gross retail tax" on "retail transactions made in Indiana." Subsection (b) states that the purchaser is liable for the tax and must pay it to the retail merchant who "**shall** collect the tax as agent for the state." (emphasis added) IC § 6-8.1-3-4 expressly states that the Department "has the sole authority to furnish forms used in the administration and collection of the listed taxes." Listed taxes include the state gross retail tax. (IC § 6-8.1-1-1).

There are many retail transactions which are exempt from the state gross retail tax; *see*, IC §§ 6-2.5-5-1 *et seq.* and 45 IAC 2.2-5-1 *et seq.* Sales to farmers and others "occupationally engaged in the business of producing food and agricultural commodities for human, animal, or poultry consumption" are exempt under certain circumstances not relevant here. In order for a retail merchant to be relieved of his duty to collect and remit Indiana's gross retail tax as agent for the state of Indiana, the transaction must fall within one of the exemptions outlined in Rule 5, Section 2.2 of Title 45 of Indiana's Administrative Code (45 IAC 2.2-5-1 *et seq.*). In addition, the transaction must have the proper documentation substantiating the purported exemption. Pursuant to 45 IAC 2.2-8-12(d), "[u]nless the seller receives a properly completed exemption

certificate, the merchant must prove that sales tax was collected and remitted to the state **or** that the purchaser actually used the item for an exempt purpose.” (emphasis added)

With respect to the validity of taxpayer’s exemption certificates, IC § 6-2.5-8-8 provides in pertinent part:

(a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.

(b) The following are the only persons authorized to issue exemption certificates:

(1) retail merchants, wholesalers, and manufacturers, who are registered with the department under this chapter.

* * *

(3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.

See also, 45 IAC 2.2-8-12 and 45 IAC 2.2-8-13. The former mandates that “[e]xemption certificates may be issued *[sic]* only by purchasers authorized to issue such certificates by the Department of Revenue.” Authorized purchasers include retail merchants, manufacturers, and wholesalers who must register as such with the Department. “All persons or entities not required to register . . . and who are exempt under this Act {such as farmers} with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transactions provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption certificate.” Subsection (d) requires that a seller receive a “properly completed exemption certificate;” if not, the “merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose.” Further, subsection (f) expressly states as follows: “An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.” 45 IAC 2.2-8-13 describes 3 classifications of “persons authorized to issue exemption certificates, including “persons who are exempt from the state gross retail tax with respect to any part of their purchases,” such as farmers purchasing items specified in other

regulations for particular purposes. Finally, 45 IAC 15-3-3(a) requires that “[a]ll returns and information required by the provisions of the listed taxes **must be submitted on forms furnished by the department.**” (emphasis added). Subsection (c) expressly states that “[r]eprints and reproductions and **nonstandard forms which do not meet the requirements mentioned above cannot be filed in lieu of the official forms.**” (emphasis added) As taxpayer did not receive “properly completed exemption certificate[s],” taxpayer must prove either the gross retail tax was collected and remitted, or the “purchaser actually used the item for an exempt purpose.”

The Department was correct in determining that taxpayer’s own exemption certificates were insufficient to relieve taxpayer of his statutory duty to collect and remit Indiana gross retail taxes due on the transactions at issue. Therefore, taxpayer must prove the disputed tax was collected and remitted, **or** that the purchaser used the items for an exempt purpose. Taxpayer admits the disputed tax was not collected or remitted. Taxpayer has since provided the Department with properly executed exemption certificates for the disputed transactions which indicate the purchasers used the items for exempt purposes.

Under IC § 6-2.5-5-1 and IC § 6-2.5-5-2, certain specified items of tangible personal property associated with agricultural activities are exempt from the state gross retail tax if “(1) the person acquiring the property acquires it for his direct use in the direct production of food or commodities for sale or for further use in the production of food or commodities for sale; and (2) the person acquiring the property is occupationally engaged in the production of food or commodities which he sells for human or animal consumption or uses for further food or commodity production.”

Indiana’s Administrative Code provides the specific parameters of the general language of the cited statutes. 45 IAC 2.2-5-3(d)(5) states that [p]urchases of fences, fencing material, gates, posts, fence stretchers and electric fence chargers are taxable.” Subsection (e)(3) states that the items listed in 45 IAC 2.2-5-3(d)(5) “are exempt only if the same are purchased for use in confining livestock during the production processes of breeding, gestation, farrowing, calving, nursing or finishing.” If the items are used to confine animals not used in agricultural production, they are taxable. If the items are used as a “partition fence between adjoining landowners or as a means to keep wildlife, stray animals, or trespassers from entering cropland or farm premises,” then the items are also taxable.

Further, 45 IAC 2.2-5-4 states that agricultural exemption certificates “may be used only if the purchaser is occupationally engaged in the business of producing food or commodities for human, animal, or poultry consumption for sale or for further use in such production.” Subsection (b) defines those “persons” for Indiana’s state gross retail and use tax purposes as “only those persons, partnerships, or corporations whose intention it is to operate a farm at a profit and not those persons who intend to operate a farm for pleasure as a hobby.”

The properly executed exemption certificates do not specifically state how the fencing materials were used. However, when taxpayer sent copies of ST – 104 forms to purchasers of the fencing materials for completion, a cover letter was included. This cover letter provides in relevant part:

The Indiana Department of Revenue has completed an audit of our sales records, and the auditors have determined that your tax-exempt purchase of fencing related materials needs to be documented with your signature on an official ST – 104 Indiana sales tax exemption form. If your purchase of fencing related materials was tax-exempt based on Indiana sales tax code, 45IAC 2.2-5-3(e)(3), then please sign the enclosed Indiana sales tax exemption form and return it to me Your signature, social security number and date are required on Form ST – 104

Please note that Indiana sales tax code, 45IAC 2.2-5-3(e)(3), states that fences, fencing materials, gates, posts, and electric fence charges are exempt only if the same are purchased for use in confining livestock during the production processes of breeding, gestation, farrowing, calving, nursing, or finishing. Fencing materials are taxable if . . .

It is reasonable to infer from the above that the fencing material purchases at issue qualify as exempt transactions. Therefore, that part of the audit adjusting gross retail tax due from taxpayer is reversed. Because taxpayer has no similar facts or documents substantiating exempt purchases of grease, repair parts, heating, and cooling equipment, that part of the audit adjusting gross retail tax due from taxpayer is upheld. The Department requested further information from taxpayer regarding the alleged exempt status of the wood-burning furnaces, asking for more specific information. Taxpayer was unable to supply documentation specific enough to overcome the presumption that the Audit Division's original assessment was correct. The applicable regulation, 45 IAC 2.2-5-3(e) is very specific: to qualify for the exemption, "heating . . . equipment" qualifies when it is "directly used in the production process, i.e., has an immediate effect on the article being produced." Taxpayer has been unable to demonstrate to the Department's satisfaction that the wood-burning stoves qualify for the exemption.

FINDING

Taxpayer's protest is partially sustained and partially denied, subject to audit's review of the submitted documentation.